

Objection to the LUST No. 199605528, Facility ID No. 8754
Fred's Service and Repair
Tipton, Tipton County, Indiana
2010 OEA 75, (07-W-J-4022)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 75, cite this case as
Fred's Service and Repair, 2010 OEA 75.

TOPICS:

Leaking Underground Storage Tank (LUST)	sand seams
No Further Action Letter	roadway
closure	corrective action
monitored natural attenuation	benzene
Well Head Protection Area	Initial Site Characterization (ISC)
municipal drinking water well	Corrective Action Plan (CAP)
well head	quarterly monitoring report
time of travel	Risk Integrated System of Closure
petroleum release	(RISC)
tank removal	Industrial Default Closure Level
remediation	Residential Default Closure Level
delineation	1994 UST Branch Guidance Manual
groundwater flow	I.C. § 13-12-3-2
Oxygen Release Compound	I.C. § 13-25-5-8.5
Further Site Investigation (FSI)	329 IAC 9-5-6
groundwater plume	329 IAC 9-5-7

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: April D. Lashbrook, Esq.

Petitioner: Glenn D. Bowman, Esq., Nicholas K. Gahl, Esq.; Stewart & Irwin, P.C.

ORDER ISSUED:

June 29, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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6. The Bob-A-Lu Site was delineated and is undergoing monitored natural attenuation. *Eric Schuemann (previous IDEM Project Manager) Dep., p. 52-55.*
7. The Sites are within a Well Head Protection Area; the City of Tipton operates a municipal drinking water well approximately 200 meters south of the Fred Henry Site. *Fred Henry Ex. 29, p. 10; Tim Veatch (IDEM Senior Environmental Manager, Office of Land Quality, Remediation Branch, Leaking Underground Storage Tanks ("LUST")) Testimony and Amended Testimony.* The area is within a one-year time of travel to the well head. *Id.* All businesses in the immediate area of the Fred Henry Site use City-provided water, and there is no anticipation that groundwater would be drawn for direct, untreated potable usage. *Richard Gehlbach (Patriot Engineering and Environmental, Inc., Principal, Senior Project Manager and Manager, Environmental Group) testimony.*
8. In May, 1996, when tanks were removed from the Fred Henry Site, a release of petroleum was discovered and assigned Release No. 199605031. *Fred Henry Petition, p. 2.* On August 16, 1996, Fred Henry submitted an Underground Storage Tank ("UST") Closure Report to IDEM. *Fred Henry Ex. 4.* In December, 1996, Fred Henry submitted its Initial Site Characterization ("ISC"). *Fred Henry Ex. 5.* On December 21, 2000, IDEM requested that Fred Henry submit a Further Site Investigation. *Fred Henry Petition, Ex. B; Fred Henry Ex. 6.* On January 18, 2001, Fred Henry submitted its FSI, in response to IDEM's request. *Fred Henry Ex. 9.*
9. In August and September, 2002, USTs and soil were removed from the Pizza Shack Site. *Fred Henry Exs. 35-43.*
10. In September, 2002, additional USTs were removed from the Fred Henry Site. *Fred Henry Ex. 10.*
11. On December 17, 2002, Pizza Shack requested a No Further Action letter from IDEM. *Fred Henry Ex. 23.*
12. On January 14, 2003, additional USTs were removed from the Fred Henry Site. *Fred Henry Ex. 7.*
13. Further cleanup activity occurred on the Pizza Shack Site. Specifically:
 - a. On February 23, 2003, IDEM State Cleanup responded to Pizza Shack's December 17, 2002 request for a No Further Action letter by informing Pizza Shack that additional investigation was necessary. *Fred Henry Ex. 24.*
 - b. On May 9, 2003, Pizza Shack responded to IDEM with additional information. *Fred Henry Ex. 11.*
 - c. On June 9, 2003, IDEM wrote to Pizza Shack in response, requesting further investigation. *Fred Henry Ex. 28.*
 - d. On July 9, 2003, Pizza Shack reported additional investigatory activities to IDEM. *Fred Henry Ex. 29.*

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- e. On August 29, 2003, IDEM issued its determination that Pizza Shack should consider active remediation strategies for the following reasons: the groundwater flow direction, the Site is within a Well Head Protection Area, and the remaining on-Site contamination. *Fred Henry Ex. 32.*
 - f. On September 10, 2003, IDEM confirmed that Pizza Shack was to use Oxygen Release Compound ("ORC") along the Site's northern border and through the utility corridor in the center of the Site. *Fred Henry Ex.33.*
 - g. In October, 2003, Pizza Shack conducted ORC injection. *Fred Henry Ex. 34.*
- 14. On January 6, 2004, IDEM made its second request for Further Site Investigation to Fred Henry. *Fred Henry Exs. C and 8.*
 - 15. On January 7, 2004, Pizza Shack submitted its first quarterly monitoring report to IDEM. *Fred Henry Ex. 35.* On January 9, 2004, Pizza Shack submitted an addendum to its ORC Injection Activities. *Fred Henry Ex. 34.*
 - 16. On February 19, 2004, Fred Henry submitted a Further Site Investigation. *Fred Henry Pet., Ex. D.* In April, 2004, Fred Henry removed 5,000 cubic yards (or 7,400 tons) of soil from its Site, and approximately 37,300 gallons of water were pumped and disposed. *Fred Henry Ex. 10.* The top 9-11 feet of soil were removed from the entire site. *Id.* Surface area on the Fred Henry Site was paved, to prevent water infiltration. *Gehlbach pre-filed testimony, p. 5.* On May 7, 2004, IDEM requested Further Site Investigation from Fred Henry. *Fred Henry Pet., Ex. E and Ex. 9.*
 - 17. The Pizza Shack Site has discontinuous water-bearing sand seams, indicating no continuous groundwater plume across the property. *Gehlbach testimony.* Groundwater flows generally to the southeast; but there is flow toward the northwest from the former Pizza Shack UST toward the Fred Henry Site. *Fred Henry Ex. 18; Jerry O'Callaghan (IDEM Project Manager) dep. p. 74; Gehlbach testimony.*
 - 18. It is not reasonably possible to determine whether contamination on the Pizza Shack's northern boundary was the residual effect from the Pizza Shack USTs or from off-site migration. *O'Callaghan dep. p. 76.* IDEM cannot determine definitively whether Pizza Shack or Fred Henry cause the impacts along the boundary between their properties. *O'Callaghan dep. p. 44, p. 90.*
 - 19. Remaining contamination from the Fred Henry Site is under the roadway dividing the Fred Henry Site and the Pizza Shack Site. *Gehlbach testimony.* IDEM does not traditionally require contamination underneath such a roadway to be investigated or remediated. *Schroer dep. pp. 53, 54.*

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20. On August 25, 2004, Fred Henry, by Patriot Engineering, submitted a report of on-site corrective action. *Fred Henry Ex. 10*. On September 13, 2004, IDEM requested further investigation from Fred Henry. *Fred Henry Ex. 11*. On April 1, 2005, Fred Henry submitted a Further Site Investigation. *Fred Henry Pet. Ex. F and Ex. 12*. On June 14, 2005, IDEM approved the Fred Henry Site Characterization and requested a Corrective Action Plan ("CAP"). *Fred Henry Pet. Ex. G and Ex. 13*.
21. On August 2, 2005, Pizza Shack submitted its 8th Quarterly Monitoring Report, which showed less than 16 µg/L (or parts per billion, ("ppb")) benzene in Monitoring Well ("MW") 3 over the previous two years. *Fred Henry Ex. 36*. MW-3 is north of Pizza Shack's former UST pit and south of the Fred Henry property boundary. *Id.* MW-3 was monitored for 8 calendar quarters, with the concentration of benzene ranging between 16 to 5.1 µ/L, or ppb. *Id.* IDEM's closure standard is 5 ppb. *Id.* On September 8, 2005, IDEM State Cleanup Section issued a No Further Action Letter to Pizza Shack. *Fred Henry Pet. Ex. I*.
22. On October 31, 2005, Fred Henry submitted a Corrective Action Plan ("CAP"), approved by IDEM in February, 2006. *Fred Henry Pet. Ex. H and Exs. 13, 14; Eric Schuemann (IDEM Project Manager for the Fred Henry Leaking Underground Storage Tank Site) Dep., p. 70*. The CAP detailed remediation actions already performed on Site, including removal of USTs, soil excavation, groundwater and surface water disposal, and groundwater monitoring. Quarterly sampling results showed a downward trend in the amount of contamination. However, the November 1, 2006 quarterly sampling results showed 140-170 ppb Benzene in MW-11 and MW-12, in the sidewalk adjacent to and to the south of the Fred Henry Site. *Fred Henry Ex. 12, 15; Pet. Ex. F*.
23. On October 31, 2007, IDEM requested Further Site Investigation from Fred Henry, including a requirement stated by Kathleen M. Simonson, IDEM Environmental Project Manager, Leaking Underground Storage Tanks ("LUST"), that monitoring wells be placed on the Pizza Shack Site by Fred Henry. *Veatch Testimony, Ex. C*.
24. Fred Henry conducted quarterly sampling and groundwater monitoring at the Fred Henry Site until 2007, but ceased when IDEM required an expansion of groundwater monitoring to include offsite locations, specifically, the Pizza Shack Site. *Fred Henry Amend. Pet., p. 5*. Fred Henry presented unrefuted testimony that it would be denied access to the Pizza Shack Site.
25. On June 18, 2008, IDEM State Cleanup Section clarified No Further Action as applying to Pizza Shack Site Release No. 2002-09014 and requested cooperation for Fred Henry's investigation on Pizza Shack property. *Fred Henry Ex. 19*.

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26. The closure objectives for the Fred Henry Site are set by applying the 1994 Guidance and Risk Integrated System of Closure ("RISC"). RISC is applied by IDEM as a policy with respect to the applicability of risk assessments to gain closure. *IDEM Nonrule Policy Document W-0046; Veatch Testimony, IDEM Exs. A, B; Fred Henry Ex. 14, p. 14-15; Schroer Dep. p. 97-98.* For benzene, the Residential Default Closure Level in groundwater is 5 µ/L. *IDEM Ex. B, p A.1-10; p. A.1015.* The Industrial Default Closure Level is 52 µ/L. *Id.* Fred Henry's consultant discussed these objectives in the Corrective Action Plan submitted on October 31, 2005. *Fred Henry Ex. 14, p. 14.*
27. On February 14, 2008, IDEM sent a Violation Letter to Fred Henry. *Fred Henry Pet. Ex. M.* IDEM's Violation Letter requested additional down-gradient delineation, required quarterly groundwater sampling as provided as a condition of the approved CAP, required an expanded investigation, and required a report to be filed by March 17, 2008.
28. Fred Henry petitioned for administrative review on December 12, 2007, and filed an Amended Petition for Administrative Review on February 21, 2008. The petitions initiated this administrative adjudicatory cause. In summary, Fred Henry sought review of IDEM's decisions concerning its requirements for further site investigation and refusal to issue a "no further action letter".
29. Pursuant to 315 IAC 1-3-1(a)(10) and with the agreement of the parties, testimony was pre-filed as follows: Petitioner Fred Henry pre-filed testimony on March 4, 2009; IDEM pre-filed testimony on April 6, 2009. An evidentiary hearing was conducted on May 21, 2009; witnesses were sworn and further evidence heard. The parties submitted Proposed Findings of Fact, Conclusions of Law and Orders on August 3, 2009.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is charged with implementation and enforcement of Indiana's environmental laws and rules. I.C. § 13-14-1-1, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction for administrative review of the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

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3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*De novo* review" means that "all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adj'd.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM's issuance of the City of Hobart NPDES Permit was proper, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559,565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26, 41.
5. Petitioner Fred Henry's timely filed Petition (and Amended Petition) for Review is based on the assertions that IDEM's decisions were in error concerning its demands for further site investigation and refusal to issue a "no further action letter". Petitioner is "aggrieved or adversely affected" by IDEM's determination, per I.C. § 4-21.5-3-7, and qualify to seek administrative review before the OEA.

Petitioner Fred Henry is not required to conduct additional site investigation.

6. 329 IAC 9-5-6(a)(1)(2) and (5) provide that further investigation of a release is necessary if
1) previous information fails to define the nature and extent of groundwater contamination;
2) if groundwater wells have been affected; or
5) at the commissioner's request, based on the potential effects of the contaminated groundwater on nearby groundwater resources. A party is not required to investigate the nature and extent of contamination from an unrelated release.

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7. The environmental sampling data and evidence submitted in the form of testimony demonstrates that the nature and extent of soil and groundwater contamination related to the release on the Fred Henry Site has been fully characterized as to nature and extent, as required in 329 IAC 9-5-6(a)(1). However, Fred Henry's November 1, 2006 quarterly sampling results showed 140-170 ppb Benzene in MW-11 and MW-12, in the sidewalk adjacent to and to the south of the Fred Henry Site.
8. The November 1, 2006 reports of benzene occurred within a Well Head Protection Area, approximately 200 meters from the well head where the City of Tipton withdraws drinking water. A one-year travel time is calculated from the Sites to the well head. No evidence was presented that the Site contamination presents an imminent threat to human health or the environment. Substantial evidence presented is not conclusive as to whether the nature, extent and location of contamination posed a risk to human health or the environment. Due to the proximity of the City of Tipton well head, the potential for risk exists. These levels of benzene contamination are 28 to 34 times the residential default closure levels and 3 times the industrial default closure levels. Thus, additional information is needed to determine the nature and extent of groundwater contamination, as stated in 329 IAC 9-5-6(a)(5). As contamination at the Fred Henry Site's south property line is significant, further completion of the CAP and its further monitoring is necessary, per IDEM's 1994 UST Branch Guidance Manual, and RISC.
9. IDEM's 1994 UST Branch Guidance Manual, and RISC guidelines provide guidance for IDEM to exercise its discretion to specific site facts in order to determine whether additional investigation is necessary and whether a site can be closed. The goal of RISC is to "establish cost-effective closure standards and closure options that result in negligible risk to human health and the environment. The RISC system is designed to provide IDEM staff, industry and consultants with a consistent, but flexible, framework for achieving closure of contaminated sites. It has expanded the number of closure options by allowing methods that prevent people from coming into contact with contamination when clean up is not technically feasible. All of these goals help IDEM achieve cost-effective closure that wisely use government's limited resources:
Introduction to RISC, IDEM Nonrule Policy Document W-0046.
10. IDEM's 1994 UST Branch Guidance Manual provides recommendations of contamination concentrations for a site to gain closure. IDEM uses its discretion in applying this guidance document to site-specific facts to determine whether further investigation is needed and whether a site is eligible for closure.

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11. Even though contamination at the south boundary of the Fred Henry Site is not fully delineated and is at a significant level, the contamination has comingled with contamination from the Pizza Shack release. The contamination cannot be isolated either to Fred Henry or Pizza Shack. The environmental sampling data and evidence submitted in this cause provide substantial evidence of Petitioner Fred Henry's compliance with its duty under applicable law to investigate and remediate contamination related to release from the Fred Henry Site. Thus, a requirement for Fred Henry to conduct additional investigation by Fred Henry to delineate the southern edge of any release by Fred Henry is not supported by substantial and reliable evidence.
12. Per RISC, plume stability can be used for contamination extending underneath a roadway, so long as institutional control is utilized.
13. Therefore, by substantial evidence, Petitioner Fred Henry has satisfied the remediation objectives outlined in I.C. § 13-25-5-8.5, IDEM's 1994 UST Branch Guidance Manual, and RISC guidelines.
14. Beyond the November 1, 2006 benzene level detection, the evidence presented in this cause does not state that IDEM modified or rescinded its previous approval of the site characterization. Instead, IDEM required Further Site Investigation.
15. Requiring additional investigation by Petitioner Fred Henry would not be in accordance with applicable law, regulations or policy.
16. No additional environmental investigation is required by Petitioner Fred Henry.

IDEM is not required to issue Petitioner Fred Henry a No Further Action Letter and is not required to close the Fred Henry Site.

17. 329 IAC 9, *et seq.*, states requirements for site closure. 329 IAC 9-5-7(f) states that corrective action conducted by the site owner must ensure that ground water cleanup objectives comply with I.C. § 13-12-3-2. I.C. § 13-12-3-2 requires groundwater remediation to be consistent with the remediation objectives stated in I.C. § 13-25-5-8.5. I.C. § 13-25-5-8.5 requires that remediation objectives be based on an assessment of the risks posed by the contamination at the site, taking into consideration the expected future use of the site, measurable risks to human health, natural resources or the environment, based on the activities that take place at the site. The remediation levels referenced by 329 IAC 9-5-7(f)(3) and I.C. § 13-25-5-8.5 are stated in the 1994 Guidance and RISC. If a site is adequately characterized, and the level of contamination is below the risk-based levels established by IDEM, additional action is not necessary to protect human health or the environment.

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18. The closure objectives for the Fred Henry Site are set by applying the 1994 Guidance and RISC. As of the most recent groundwater sample submitted by Fred Henry on November 1, 2006, the benzene contamination does not meet either the 1994 Guidance or RISC Residential or Industrial Default Closure Levels. The Fred Henry Site November 1, 2006 quarterly sampling results of 140-170 ppb Benzene in MW-11 and MW-12, in the sidewalk adjacent to and to the south of the Fred Henry Site, exceeded both the RISC Residential Default Closure Level for groundwater of 5 µ/L, and the Industrial Default Closure Level of 52 µ/L. By substantial evidence, RISC remediation objectives have not yet been met, thus, the Fred Henry Site is not eligible for closure.
19. The CAP as approved by IDEM sufficiently addressed remediation objectives for the Fred Henry Site, per guidance provided by RISC and the 1994 UST Branch Guidance Manual. The Fred Henry Site CAP provided for eight quarters of groundwater monitoring. When IDEM required Fred Henry to conduct monitoring at the Pizza Shack Site, a site where Fred Henry did not have monitoring access, Fred Henry stopped its monitoring. Until the CAP is completed, and all requirements of 329 IAC 9 are met, the Fred Henry Site is not eligible for closure.
20. By substantial evidence, IDEM is not authorized to issue a No Further Action letter for the Fred Henry Site.

FINAL ORDER

AND THE COURT, being duly advised by all of the foregoing, hereby **FINDS AND ORDERS** that Petitioner, Fred Henry, Fred's Service and Repair, has presented substantial evidence required to meet its burden of showing that it lacks authority to conduct additional Site investigation on a site not under its ownership and control, the Pizza Shack Site. Petitioner Fred Henry has further presented substantial evidence required to meet its burden of showing that further environmental investigation to delineate Site contamination would not be in accordance with applicable law, regulations or policy. Petitioners, Fred Henry, Fred's Service and Repair, did not provide substantial evidence required to meet its burden of showing that the Site remediation measures have been completed so that the Site is eligible for closure and for IDEM's issuance of a No Further Action letter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner, Fred Henry, Fred's Service and Repair's Petition for Administrative Review is **GRANTED** as to the following issue: that Fred Henry, Fred's Service and Repair, has investigated the contamination of Petitioner's release.

IT IS FURTHER ORDERED that Petitioner, Fred Henry, Fred's Service and Repair's Petition for Administrative Review is **DENIED** as to requiring the Indiana Department of Environmental Management to issue a No Further Action Letter to Petitioner, Fred Henry, Fred's Service and Repair. This cause is **DISMISSED**. All further proceedings are **VACATED**.

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You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 29th day of June, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge